89- 18

No.

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

OREGON PHYSICIANS' SERVICE,
an Oregon nonprofit corporation,

Petitioner,

v.

JOHN HAHN, WADE LIGGETT,
JOSEPH AIZAWA, V.G. LIVINGSTON,
HUGH FRASER, and HIDE AIZAWA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Ninth Circuit's opinions in this important antitrust litigation raise issues inimical to the provision of health care to consumers in an efficient and competitive manner. Those published opinions conflict with the results reached and the legal standards applied by this Court and courts in other circuits.

In opinions authored by Circuit Judge Fletcher, the Ninth Circuit rulings may dismember and deter a wide range of efficient and competitive cost containment efforts by health care consumers, purchasers, providers, indemnitors, and insurers. The Ninth Circuit had reversed the first summary judgment for the Blue Shield defendant granted on grounds of McCarran-Ferguson Act exemption and lack of interstate commerce. On remand, after the completion of all discovery and numerous proceedings leading to an evaluation on the merits, the District Court granted a second summary judgment where, although claiming damages of millions of dollars, the six individually named plaintiffs failed to produce evidence of conspiracy, market power or abuse thereof, or antitrust standing or injury. In reversing this summary judgment on the merits, the Ninth Circuit attempts to resurrect and extend theories from a Fourth Circuit opinion dating from the beginning of this decade. Since that Fourth Circuit opinion, other courts have rejected similar claims and upheld decisions for Blue Shield defendants in the First, Second, Third, Fifth, Seventh, and Eighth Circuits. Other courts, including this Court and the Fourth, Sixth, Tenth, and Eleventh Circuits, have rejected similar claims and upheld decisions for health care defendants in structurally indistinguishable factual circumstances.

As a result, these six remote individual plaintiffs--who in fact lack standing--are able to condemn competitive activities of this Blue Shield defendant under a flawed banner of "*per se*" violations of the federal antitrust laws, without any proof of conspiracy, restraint, or injury.

The Ninth Circuit reached these anomalous results by its contrary resolution of these fundamental legal questions:

1. Can the sole defendant, a nonprofit corporation created under Oregon statutes and supervised by the Oregon Insurance Commissioner as a health care service contractor, be charged with "conspiracy" with its own members?

    a. If so, is not such a "conspiracy" "vertical" - rather than "horizontal," where the sole defendant and the plaintiffs do not compete?

    b. If so, can such a "conspiracy" be inferred from the mere fact that some physician members might compete with plaintiffs, where such physicians are not on the corporate defendant's board or do not make policy or payment decisions?

2. Can "price-fixing" be inferred from the mere fact that the sole defendant takes a confidential survey of its members' various fees for service, and then determines on its own how to reimburse for services rendered by nonmembers to its subscribers, leaving nonmembers such as plaintiffs free to charge fees at whatever level each wants and to collect from their own patients whatever amount is not reimbursed by defendant?

a. If so, can plaintiffs prevail against the purchaser/indemnitor defendant where their own patients have already paid them for services rendered?

b. If so, can such "vertical" "price-fixing" be condemned as a "*per se*" violation?

3. Can a "group boycott" be inferred from the mere fact that the sole defendant had not yet extended membership to plaintiffs' category of health care provider, where the Oregon state statutes make a distinction between plaintiffs' category and medical and osteopathic doctors, specifically prohibit the plaintiff providers from performing certain procedures which medical and osteopathic doctors may perform, and require plaintiffs to be supervised by medical or osteopathic doctors in certain circumstances?

a. If so, can plaintiffs prevail without showing detriment to the market or market power?

b. If so, can plaintiffs prevail even though plaintiffs have not demonstrated injury to competition?

PARTIES TO THE PROCEEDINGS

Petitioner Oregon Physicians' Service ("OPS") was the only appellee and defendant below on this summary judgment.

Respondents were named as the appellants and plaintiffs below. They were: John Hahn, Wade Liggett, Joseph Aizawa, Hide Aizawa, V. G. Livingston, and D. Hugh Fraser.

As noted by the courts below, on March 1, 1983, petitioner OPS, a "Blue Shield" corporation, merged with Northwest Hospital Service, doing business as Blue Cross of Oregon, and the named plaintiffs subsequently became participating physicians in the resulting organization, known as Blue Cross and Blue Shield of Oregon. App. A at 6 (868 F.2d at 1025 n.2); App. B at 26 (860 F.2d at 1504 n.2). Blue Cross and Blue Shield of Oregon is involved in a joint venture--Oregon Preferred Care Network, an Oregon nonprofit corporation--with Good Samaritan Hospital and Medical Center, a nonprofit corporation, Tuality Management Systems, a stock corporation, Portland Adventist Medical Center, a nonprofit corporation, Northwest Physicians' Association, a stock corporation, Pacific Physicians' Association, a stock corporation, and Portland Alliance for Health, Inc., a stock corporation.

Other parties, previously involved but dismissed from these proceedings before the latest summary judgment for petitioner and the following appeal, are listed in a prior petition for a writ of certiorari in this matter involving questions of interstate commerce and McCarran-Ferguson Act coverage. See petition No. 82-1773.

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Petitioner Oregon Physicians' Service ("OPS") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The latest summary judgment opinion of the District Court appears as App. C in the Appendix. The opinions of the Court of Appeals are reported at 868 F.2d 1022 and 860 F.2d 1501 and appear as App. A and B in the Appendix. (Previous opinions are published at 508 F. Supp. 970 and 689 F.2d 840 and appear in the appendix to petition No. 82-1773 as App. A and B.)

JURISDICTION

The judgment of the Court of Appeals was entered, as amended, on February 27, 1989 (App. D). A timely petition for rehearing was denied on March 31, 1989 (App. E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 *et seq.*
The Clayton Act, 15 U.S.C. § 12 *et seq.*
The Oregon Podiatrists Statutes, ORS 682.010.
The Oregon Insurance Code Insurance Policies Statutes, ORS 743.006-009.
The Oregon Insurance Code Health Care Service Contractors Statutes, ORS 750.005-075.

(All contained in the appendix to petition No. 82-1773, App. G through M.)

STATEMENT OF THE CASE

The Initial District Court Opinion.

An organization known as Fair Action Committee for Education ("FACE") filed this action in September, 1978, alleging that the petitioner-appellee-defendant-health care service contractor conspired to boycott podiatrists in favor of other physicians in violation of the Clayton Act, 15 U.S.C. § 12 *et seq*, and the Sherman Act, 15 U.S.C. § 1 *et seq*. Later, a number of individual podiatrists withdrew from the litigation, and the few remaining podiatrists substituted an amended complaint, losing FACE as a plaintiff and prosecuting the action in their names only. (The action has not been prosecuted as a class action, and now there are six named individual plaintiffs.) After initial discovery OPS moved for summary judgment, and the United States District Court for the District of Oregon, Judge Solomon presiding, granted the motion on February 27, 1981.

With respect to the McCarran-Ferguson Act, the District Court noted that OPS was a regulated health care contractor under ORS 743.006, 743.009, 746.160(3), and 750.005 *et seq*. 508 F. Supp. at 972 n.1, 975. The District Court found that there were services involving the foot which Oregon podiatrists may not perform, and held that there was a rational basis for the policy limitations on the coverage of podiatric care, supported by the licensing provisions under the Oregon Podiatrists Statute, ORS 682.010(3). 508 F. Supp. at 974. The District Court distinguished and rejected the Fourth Circuit's analysis in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (*"Virginia Academy"*), noting that the holding in that case must be considered in connection with Virginia's "Freedom of

Choice" statute (Va. Code § 38.1-824), which contrary to the Oregon statutes here, prohibited health insurers from differentiating between services rendered by different providers. 508 F. Supp. at 974-975. The District Court then found that no boycott was involved here, noting that OPS did not control the health insurance market. The District Court also found that plaintiffs had failed to present any evidence of concerted action. 508 F.Supp. at 975-976.

With respect to jurisdiction, the District Court found that under the tests set forth, *inter alia*, in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) (*"McLain"*), plaintiffs had failed to show a "not insubstantial effect" on interstate commerce. 508 F. Supp. at 977.

The First Ninth Circuit Decision.

On the record before it, a Ninth Circuit panel held that because the challenged activities did not appear to be part of the "business of insurance," the McCarran-Ferguson Act exemption was inapplicable, and it reversed the District Court's findings that plaintiffs had failed to meet the interstate commerce requirement.* 689 F.2d at 841-844.

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* OPS petitioned for a writ of certiorari on the grounds that that panel decision was in direct conflict with *McLain*, *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc) (*"Crane"*), and *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981) (*"Cordova"*) with respect to the interstate commerce test, and that the panel had misapplied the McCarran-Ferguson Act. That petition was denied at that time. 462 U.S. 1133 (1983). The Eighth Circuit has since rejected the Ninth Circuit interstate commerce holding here, noting it conflicts with the decisions in *McLain* and *Crane*. *Hayden v. Bracy*, 744 F.2d 1338, 1343 n.2 (1984). A district court has also noted the direct conflict between other

The District Court Opinion on Remand.

On remand, after full discovery by both sides and proceedings designed to focus on the issues to be decided by the court, the District Court, District (now Circuit) Judge Leavy presiding, ultimately granted OPS' motion for summary judgment on the grounds that plaintiffs still had failed to produce evidence of a conspiracy, following the Third Circuit decision in *Pa. Dental Ass'n v. Medical Services Ass'n of Pa.*, 745 F.2d 248, 258 (1984), *cert. denied*, 471 U.S. 1016 (1985) (*"Pennsylvania Blue Shield"*), and that plaintiffs had failed to produce evidence of injury to competition, following this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*"Brunswick"*).

The Second Ninth Circuit Opinion.

On plaintiffs' second appeal, the second Ninth Circuit panel here reversed on the grounds that an "inference" of conspiracy could be drawn from the fact

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*cont.

circuits' decisions and the Ninth Circuit decision here. *Litman v. A. Barton Hepburn Hosp.*, 679 F. Supp. 196, 200 (N.D.N.Y. 1988) (citing *Cordova; Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden*; and *Crane* as rejecting the *Hahn* and other Ninth Circuit decisions). *See Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 & n.1 (6th Cir. 1987) (following *Cordova, Furlong, Seglin, Hayden,* and *Crane* in rejecting Ninth Circuit interstate commerce test). The Eighth Circuit has also come to a different conclusion regarding the application of the McCarran-Ferguson Act to another Blue Shield plan. *Health Care Equalization Com. v. Iowa Medical Soc.*, 851 F.2d 1020, 1027-1029 (1988). This Court has not yet resolved this split in authority, and it may be time for this Court to review the interstate commerce and McCarran-Ferguson Act standards on the expanded record now developed here after full discovery.

that some physicians might compete with plaintiffs and some other noncompeting physicians were on the board of OPS; the fact that OPS had some policies that provided for reimbursement of its subscribers for services rendered by nonmembers at an indemnity schedule of less than 100 percent (while having other policies, including some that provided for reimbursement at 100 percent of the fee billed by nonmembers such as plaintiffs) could constitute "*per se*" "price-fixing"; and plaintiffs might be able eventually to come up with evidence that OPS "boycotted" plaintiffs. The panel reached these results by applying burdens of proof and persuasion on defendant OPS, rather than plaintiffs, and following the decision in *Virginia Academy*. 860 F.2d at 1505,1507, 1508-1510 (App. B at 27, 28, 32-33, 34-37, 40).

The Third Ninth Circuit Opinion, Amending the Second.

The panel later amended its opinion. Although it deleted one of the sentences in its original opinion regarding burden of proof and persuasion, it followed the same analysis and achieved the same result. Further, it added a new footnote (868 F.2d at 1029 (App. A at 14-15) n.5), and substituted language for some of the portions. 868 F.2d at 1030 (App. A at 17-18). The Ninth Circuit noted that plaintiffs have withdrawn any Sherman Act § 2 claims. 868 F.2d at 1026 (App. A at 8) n.3.

REASONS FOR GRANTING THE WRIT

Courts in other circuits have rendered decisions diametrically opposed to the Ninth Circuit decisions here regarding the legality and effect of similar health care arrangements. Such a conflict presents the paradigm for granting certiorari under this Court's Rule 17.1(a). Likewise, the difference in results highlights the conflict between the decisions here and this Court's decisions,

presenting a separate reason for granting certiorari under this Court's Rule 17.1(c).

Certiorari is particularly appropriate because the conflicts dramatize legal issues fundamental to the proper enforcement and application of the Sherman Act: the need to honor the balance struck by Congress in the Sherman Act, which allows unilateral conduct by corporations unless it tends towards abuse of monopoly power and prohibits only unreasonable restraints of trade that injure competition. Here, the Ninth Circuit has upset that balance by allowing remote plaintiffs to proceed on "*per se*" theories against "vertical" conduct by a single defendant who has little "market share," conduct that neither unreasonably restrains trade or injures competition.

Faced with standards so amorphous that the same practices can be simultaneously condoned and condemned by different courts, health care planners have no way of rationally conducting activities. This uncertainty can seriously deter the competition the antitrust laws seek to encourage in this important developing sector of the national economy. As this Court emphasized in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981), with respect to another private federal antitrust question: "any discussion of this problem must consider the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." To allow the Ninth Circuit opinions here to stand would "chill wholly legitimate business arrangements" for health care throughout the Ninth Circuit and this Nation.

I

The Intra-Enterprise and "Walking" Conspiracy Theories Accepted by the Ninth Circuit Here Have Been Rejected by Courts in Other Circuits Applying Principles Set Forth by This Court, so That There Should Be No Finding Here of Conspiracy With OPS--The Defendant Corporation--and Its Own Members.

The Ninth Circuit here allows plaintiffs to proceed on two "intra-enterprise" theories of "conspiracy," in spite of plaintiffs' failure to identify a single "co-conspirator." Plaintiffs argued that the sole defendant, OPS, somehow conspired with its own unidentified members, and that somehow OPS is, itself, a "conspiracy." Either way, plaintiffs cannot prevail under a "conspiracy" theory: in the first instance because they have failed to identify, much less prove, a "conspiracy" with any "co-conspirators"; and in the second, because it is not possible as a matter of law. The nonprofit corporation here, created under Oregon statutes and supervised by the Oregon Insurance Commissioner as a health care service contractor, cannot be charged with "conspiracy" with its own physician board members. Nor can plaintiffs prevail under a theory that defendant, itself, is a "conspiracy" of its members.

The Ninth Circuit panel ignored these fundamental principles, resulting in conflict with this Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (*"Monsanto"*) and *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (*"Copperweld"*), the First Circuit's decision in *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1984), *cert. denied*, 471 U.S. 1029-1030 (1985) (*"Blue Shield of Massachusetts"*), the Fourth Circuit's decision in *Cooper v. Forsyth County Hosp. Authority, Inc.*, 789 F.2d 278, *cert. denied*, 479 U.S. 972 (1986) *("Cooper")*, the Sixth

Circuit's decision in *Potters Medical Center v. City Hosp. Ass'n.*, 800 F.2d 568 (1986) (*"Potters"*), and the Tenth Circuit's decision in *McKenzie v. Mercy Hosp. of Independence, Kansas,* 854 F.2d 365 (1988) (*"McKenzie"*).

Following *Monsanto*, this Court in *Copperweld* rejected the type of "intra-enterprise" conspiracy theories advanced here. 467 U.S. at 769. Significantly, this Court in *Copperweld* explicitly disapproved of and overruled prior decisions to the contrary. 467 U.S. at 777.

In *Blue Shield of Massachusetts*, the First Circuit held that the Blue Shield defendant could not be considered merely a "sham" organization acting on behalf of the physician members, but was instead a legitimate "purchaser" of health care services from its members for its subscribers, and a legitimate indemnitor. 749 F.2d at 924-926, 932.

The Fourth Circuit, in *Cooper*, held that podiatrists had failed to establish a conspiracy, and hence that they could not prevail on their § 1 claims. Plaintiffs had charged a hospital with a "conspiracy" to deny them unrestricted privileges. Orthopedists, who by specialty perform services on the foot, generally competed with podiatrists, who were prohibited from performing certain services for the foot. 789 F.2d at 279. Orthopedists participated in hearings held by the hospital regarding changes in bylaws that would allow privileges to podiatrists. The bylaws committee, having heard the orthopedists' objections, recommended against changing the bylaws, and the hospital board accepted that recommendation, leaving bylaws which excluded podiatrists from privileges. 789 F.2d at 279-280. Following *Monsanto*, the Fourth Circuit held that this was not sufficient to find a conspiracy, citing, *inter alia*, other decisions in which courts had found plaintiff podiatrists

had failed to prove similar "conspiracy" theories. 789 F.2d at 281, citing, *Feldman v. Jackson Memorial Hospital*, 571 F. Supp. 1000, 1007 (S.D. Fla. 1983), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 472 U.S. 1029 (1985) (*"Feldman"*). The decision in *Feldman* holds that even orthopedists are not necessarily "competitors" of podiatrists where such orthopedists either do not practice privately, or do not practice in the areas in which the podiatrists practice. 571 F. Supp. at 1007 & nn. 11, 12. In short, even orthopedists, who are the medical doctors with whom podiatrists are most likely to compete directly, are not necessarily competitors with specific podiatrists, depending on private practice and specialty status, and therefore are not "co-conspirators" absent some evidence that they are in fact co-conspirators. To the contrary, here the Ninth Circuit presumes a conspiracy even absent competition with the plaintiffs.

The Sixth Circuit in *Potters* holds that a board member of a hospital cannot, as a matter of law, "conspire" with the hospital for purposes of the Sherman Act, stating it has never endorsed an "independent personal stake" "exception" suggested by other circuit court decisions, noting "rather substantial policy reasons for not adopting such an exception." 800 F.2d at 572-573. In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988), the Ninth Circuit rejects *Potters* (and *Weiss v. York Hosp.*, 745 F.2d 786, 816-817 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985)), and holds that a medical staff can conspire with a hospital (citing for support *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1280 (11th Cir. 1988) [vacated, 861 F.2d 1233 (1988), reinstated in part pending rehearing, 1989-1 CCH Trade Cases ¶ 68,587 (1989) (en banc)]).

The Tenth Circuit in *McKenzie* recently held that physician plaintiffs' failure to identify co-conspirators was

fatal to plaintiffs' claims of conspiracy against a single health care service defendant. 854 F.2d at 367-368.

The Ninth Circuit's holding here allows the six individual podiatrist plaintiffs to proceed on a conspiracy theory without identifying a single co-conspirator--competitor or otherwise. The Ninth Circuit allows plaintiffs to proceed against OPS on a theory that OPS' own members somehow "conspired," relying upon a Fourth Circuit opinion in *Virginia Academy* that should be limited to its peculiar facts or overruled.

The Ninth Circuit holds that "so long as physicians * * * control the health care plan," plaintiffs may proceed, stating that is the "broad proposition" for which the decisions, including *Pennsylvania Blue Shield* stand. This holding is wrong: these decisions narrowly hold that if actual competitors (not just generic "physician") directly control the pricing and reimbursement (not just general management of the plan), plaintiffs may state a claim. The Ninth Circuit expansion to the contrary is not only unwarranted but dangerous.

The Ninth Circuit has rejected the analysis followed by the Sixth Circuit in *Potters*, and the result here is in conflict with the First Circuit's holding in *Blue Shield of Massachusetts*, the Fourth Circuit's decision in *Cooper*, the Tenth Circuit's holding in *McKenzie*, the Eleventh Circuit courts' holding in *Feldman*, and this Court's decisions in *Monsanto* and *Copperweld*. Accordingly, this Court should grant a writ of certiorari to review and reverse the Ninth Circuit decision here.

A.

There Cannot Be a "Horizontal" "Conspiracy" by OPS Here, Because OPS Does Not Compete With Plaintiffs, and the Ninth Circuit Result Here Is Contrary To Decisions by This Court and the First, Fifth, and Seventh Circuits Regarding Blue Shield Defendants in Texas, Massachusetts, and Indiana.

Even if OPS could be found to have "conspired" regarding podiatrists, the "conspiracy" would be "vertical," not horizontal. The six individual plaintiffs here did not sue individual physicians with whom they might be in "horizontal" competition, but instead sued the single corporate entity OPS.

The distinction is important, as recognized by this Court in *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (*"Blue Shield of Texas I"*), followed on remand by the Fifth Circuit in *Royal Drug Co. v. Group Life and Health Ins. Co.*, 737 F.2d 1433 (1984), *cert. denied*, 469 U.S. 1160 (1985) (*"Blue Shield of Texas II"*), and *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 CCH Trade Cases ¶ 66,849 (App. F), 776 F.2d 1046 (1985), *cert. denied*, 475 U.S. 1090 (1986) (*"Blue Shield of Texas III"*), and held by the First Circuit in *Blue Shield of Massachusetts*, and the Seventh Circuit in *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196 (1985) (*"Blue Shield of Indiana"*).

In *Blue Shield of Texas II*, the Fifth Circuit, following this Court's decision in *Blue Shield of Texas I*, held that the alleged "conspiracy" by the Blue Shield defendant was not "horizontal." 737 F.2d at 1436-1437. Similarly, in *Blue Shield of Texas III*, the Fifth Circuit followed its decision in *Blue Shield of Texas II* and held

that plaintiffs did not compete with Blue Shield defendants, and there could be no horizontal restraint. Note 3, ¶ 68,849 at 64,217 (App. F at 59).

In *Blue Shield of Massachusetts*, the First Circuit cites the *Blue Shield of Texas I & II* decisions for its holding that the Blue Shield defendant was a single firm "purchaser" of services from its member physicians, serving as an indemnitor for its subscribers. 749 F.2d at 924. The First Circuit explicitly holds that because the Blue Shield defendant is a single firm, in vertical relationship with its physician members and subscribers, any alleged "conspiracy" against the plaintiff physicians must also be vertical, not horizontal, and no horizontal price-fixing could be involved. 749 F.2d at 930.

The Seventh Circuit, in *Blue Shield of Indiana*, following the decisions in *Blue Shield of Texas I & II* and *Blue Shield of Massachusetts*, likewise holds there is no "horizontal" restraint. 768 F.2d at 199.

The Ninth Circuit's treatment of the arrangement here as a "horizontal" "conspiracy" is in direct conflict with this Court's and the Fifth Circuit's decisions in *Blue Shield of Texas*, the First Circuit's in *Blue Shield of Massachusetts*, and the Seventh Circuit's in *Blue Shield of Indiana*. Accordingly, this Court should grant the writ of certiorari to review and reverse the Ninth Circuit's erroneous holdings to the contrary.

B.

The District Court Properly Applied Summary Judgment Standards in Determining That Plaintiffs Had Failed To Come Forward With Probative Evidence That There Was Any Conspiracy: The Ninth Circuit Reversal Based On the Mere Fact That Some Physicians Somewhere Might Compete With Podiatrists, and Other Physicians Were Members Of The Board of OPS, Is Contrary to Decisions From This Court and the Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.

As this Court held in *Monsanto*:

> "If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in [*Continental T. V., Inc. v. GTE*] *Sylvania* [*Inc.* 433 U.S. 36 (1977)] and [*United States v.*] *Colgate* [*& Co.*, 250 U.S. 300 (1919)] will be seriously eroded.
>
> "The flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger." 465 U.S. at 763-764 (citation and footnote omitted).

The Ninth Circuit erred by failing to require plaintiffs to come forward with evidence of a conspiracy. Although the panel deleted one egregious sentence from its first opinion, the second opinion still contains language reflecting an incorrect summary judgment standard, and still proceeds on the same incorrect analysis to determine that plaintiffs should be allowed to go to trial on an unfounded "inference" of a "walking conspiracy." In so doing, the Ninth Circuit panel decision conflicts with this Court's decision in *Monsanto*, the Third Circuit's decision in *Pennsylvania Blue Shield* and the Fifth Circuit's decision in *Consolidated Metal Prod. v.*

Amer. Petro. Institute, 846 F.2d 284, 293-294 (1982); this Court's summary judgment decisions in *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986) (*"Matsushita"*), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (*"Anderson"*), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (*"Celotex"*); and applications of the standards articulated there in antitrust health care conspiracy cases such as *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101-103 (4th Cir. 1987) (*"White"*); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir.), *cert. denied*, ___U.S.___, 109 S. Ct. 137, 102 L. Ed. 2d 110 (1988) (*"Collins"*); *Health Care Equalization Com. v. Iowa Medical Soc.*, 851 F.2d 1020, 1031-1032 (8th Cir. 1988) (*"Blue Shield of Iowa"*).

The Third Circuit has held that an antitrust defendant, such as OPS here, is not under any affirmative obligation to "prove" the absence of conspiracy. *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1229, 1231 n.13 (1988) (*"Houser"*). The Tenth Circuit in *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1379 n.3 (1988) (*"Dreiling"*), explicitly rejects the notion articulated by the Ninth Circuit here that a defendant's summary judgment should be reversed if plaintiffs "could" or "might" possibly adduce evidence to support their theories. In *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-1580 (1988) (*"Dunnivant"*), the Eleventh Circuit emphasizes that it is an antitrust plaintiffs' burden to present sufficient evidence to prove its case on defendant's motion for summary judgment. These decisions mark a reemphasis on the burden on an antitrust plaintiff to come forward with admissible evidence of a conspiracy, and the duty of a court not to indulge in inferences in favor of conspiracy absent significant proof tending to exclude an equally permissible inference of legitimate conduct. The Ninth

Circuit panel here refused to heed the proper summary judgment standard, leading to an erroneous result.

Not only did the Ninth Circuit fail to follow the proper summary judgment standards in evaluating the lack of evidence of conspiracy, but it erroneously embraced a "walking conspiracy" theory from the dated Fourth Circuit opinion in *Virginia Academy*, in conflict with rejections of just such a "walking conspiracy" theory by the Third Circuit in *Pennsylvania Blue Shield* and the Fifth Circuit in *Consolidated*.

The *Pennsylvania Blue Shield* case is particularly apt, because it too concerns charges of a "conspiracy" against a Blue Shield defendant. There, dentists charged that competing dentists comprised the majority of two committees of the board of the Blue Shield defendant. The Third Circuit rejected plaintiffs' "horizontal conspiracy with a vertical link" theory, noting that, as this Court had held in *Blue Shield of Texas I*, the Blue Shield defendant was merely a "purchaser" of services from dentists on behalf of its subscribers, and was an indemnitor for such services. 745 F.2d at 256-257. It specifically rejects application of the "walking conspiracy" theory of *Virginia Academy*. 745 F.2d at 257-258 & n.5. In particular, it holds that it is not enough to contend that members of the defendant Blue Shield might be able to compete with plaintiffs, because the court must look at whether actual competitors in the relevant market are involved. 745 F.2d at 258. This directly contradicts the holding by the Ninth Circuit here, where the mere possibility that some members of OPS might compete with some podiatrists somewhere was held sufficient. An "inference" of physician control cannot be enough here, not only because it is not reasonable on the record, but because the focus should be on whether competitors conspired against plaintiffs.

"Physicians" are not surrogates for "competitors," and mere physician membership on a board or committee is not a surrogate for "conspiracy." It is not reasonable to infer that because "physicians" were a majority of the board for a period of time, those "physicians" were "competitors" with "independent" economic motives who "conspired" against these individual plaintiff podiatrists with whom they did not compete. The bald statement that "physicians occupied a majority of the board seats supports at a minimum an inference that OPS is not an independent provider of health care," or "an inference that OPS is controlled by competitive providers" is simply not supportable. OPS is a "purchaser" and "indemnitor" reimbursing subscribers for services provided by physicians, including plaintiff podiatrists. Had the Ninth Circuit followed the Third Circuit's *Pennsylvania Blue Shield* test, it would have had to affirm the District Court's summary judgment here, which explicitly followed that Third Circuit test. The Fifth Circuit in *Consolidated* likewise rejects a "walking conspiracy" theory, and is likewise contrary to the Ninth Circuit decision here.

Because of the direct conflict here between the Third Circuit's rejection of the "walking conspiracy" on similar footing involving another Blue Shield defendant, the Ninth Circuit's rejection of the district court's application of that Third Circuit test, the Fifth Circuit's rejection of a similar "walking conspiracy" theory, and the Ninth Circuit's failure to follow the appropriate summary judgment standards articulated by this Court in *Anderson, Celotex,* and *Matsushita,* putting the Ninth Circuit decision in conflict with the decisions by the Third Circuit in *Houser,* the Fourth Circuit in *White,* the Seventh Circuit in *Collins,* the Eighth Circuit in *Blue Shield of Iowa,* the Tenth Circuit in *Dreiling*, and the Eleventh Circuit in *Dunnivant*, this Court should grant

the writ of certiorari to review and reject the Ninth Circuit's erroneous "inference" of a "walking conspiracy" theory.

II

Contrary to the Ninth Circuit Decision Here, Under Blue Shield Decisions From the First, Second, Third, and Seventh Circuits, This Court's Decision in *Maricopa* is Inapposite, and There Was No Price-Fixing Conspiracy.

The Ninth Circuit's approval of a "*per se*" price-fixing conspiracy theory here conflicts with the decisions by the First Circuit in *Blue Shield of Massachusetts*, the Second Circuit in *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502, 505 (2d Cir. 1982) (*"Blue Shield of Connecticut"*), the Third Circuit in *Pennsylvania Blue Shield,* and the Seventh Circuit in *Blue Shield of Indiana,* and constitutes an unwarranted mischaracterization and extension of this Court's decision in *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982) (*"Maricopa"*).

As noted already, the First Circuit in *Blue Shield of Massachusetts* rejected similar claims of "horizontal conspiracy." That included a claim of "*per se*" horizontal price-fixing. The First Circuit distinguished the *Maricopa* decision on the grounds that the Blue Shield defendant before it was a single firm regulated by the state, and under this Court's decision regarding a similar Blue Shield defendant in *Blue Shield of Texas I*, the defendant was not a "sham" organization of physicians forming a "horizontal" conspiracy. 749 F.2d at 924-926, 930.

In *Blue Shield of Connecticut,* the Second Circuit likewise follows this Court's decision in *Blue Shield of Texas I* to hold that a Blue Shield defendant was not engaged in horizontal price-fixing, again distinguishing

Maricopa as involving entirely different facts. 675 F.2d at 506. The Second Circuit notes that the Justice Department took the position that the Blue Shield type of arrangement was legal. 675 F.2d at 506 n.4.

Similarly, the Third Circuit in *Pennsylvania Blue Shield*, citing *Blue Shield of Connecticut,* holds that the Blue Shield arrangement does not constitute a per se price-fixing conspiracy, distinguishing the situation in *Maricopa*. The Third Circuit notes that this Court has not condemned vertical arrangements such as the Blue Shield one before it. 745 F.2d at 259.

Following *Blue Shield of Massachusetts* and *Blue Shield of Connecticut*, among other decisions, the Seventh Circuit in *Blue Shield of Indiana* likewise holds there was no price-fixing violation by the Blue Shield defendant. 768 F.2d at 199.

The District Court here properly found no evidence of conspiracy. Plaintiffs failed to produce evidence of any conspiracy. There is not even the suggestion that any physician, much less a member physician, agreed with anyone to have podiatrists reimbursed at a lesser absolute amount. To the contrary, the evidence was that podiatrists, including plaintiffs, could be reimbursed at amounts equal to or greater than any given physician, that plaintiffs in fact treated subscribers to OPS, and that OPS reimbursed at least a portion, if not all, of plaintiffs' fees for service to any given subscriber. OPS had a number of different policies, negotiated with its many different subscribers and subscriber groups. Some of those policies called for reimbursement of subscribers treated by nonmember health care providers at 100 percent, others called for reimbursement at 60 percent (and still others had other terms). Some of those policies called for payment to members only after certain

copayments, deductibles, and other charges had been paid, and the member agreements provided for a loss withhold in the event subscriber premiums did not cover the total outlay for payment and administrative costs. Hence members sometimes obtained less than 100 percent of their fee from OPS, and at least once in the past, the risk-withhold provisions had been exercised, and all members at that point received less than 100%, a risk not shared by nonmembers. There is no evidence of conspiracy of any sort, much less a "price-fixing" conspiracy. Each member physician was paid on the basis of that individual physician's independently determined fee for service. All that OPS did was to determine, for itself, that it would not generally pay for fees exceeding the 90th percentile of surveyed fees. In practice, that meant that each member physician was paid for each individual fee, whether that was at the 10th, 20th, 50th, 60th, 90th or other percentile. The evidence was that individual fees varied widely, and were reimbursed at widely varying rates.

Although the Ninth Circuit panel purports to follow *Maricopa*, its decision is inconsistent with this Court's decision for the reasons articulated by the First, Second, Third, and Seventh Circuits, and this Court should grant review.

A.
Plaintiffs Lack an Antitrust Leg to Stand on Here Because Their Patients Have Paid Them the "Balance Billing," and OPS Subscribers, Not Plaintiff Health Care Providers, Are the Only Ones Who Could Prosecute an Antitrust Action Under Blue Shield Decisions of This Court and the First Circuit

The Ninth Circuit erred by allowing plaintiffs to proceed without a showing of antitrust standing. This puts the

Ninth Circuit decision in conflict with this Court's decision in *Blue Shield of Virginia v. McCready,* 457 U.S. 465 (1982) (*"Blue Shield of Virginia"*), and the decision by the First Circuit in *Blue Shield of Massachusetts.*

As this Court held in *Blue Shield of Virginia,* health care provider plaintiffs such as those here lack standing to prosecute any antitrust action against Blue Shield defendants:

> "McCready has paid her psychologist's bill; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services." 457 U.S. at 474-475 (footnote omitted; emphasis added).

The First Circuit's decision in *Blue Shield of Massachusetts* follows this approach regarding a "predatory pricing" claim, holding plaintiffs such as those here are "too remote" from any possible antitrust injury to be able to prosecute an antitrust action against a Blue Shield defendant. 749 F.2d at 933.

Because to allow these plaintiffs to proceed would conflict with this Court's decision in *Blue Shield of Virginia* and the First Circuit's in *Blue Shield of Massachusetts,* this Court should review and reverse the Ninth Circuit decisions here.

B.

In Any Event, as Held in Blue Shield Decisions From The First, Second, Third, Fifth, and Seventh Circuits, the "Vertical" Arrangement Here Should Not Be Condemned Under a "*Per Se*" Label.

The Ninth Circuit's suggestion that a "*per se*" theory was viable here is counter to this Court's admonition not to expand "*per se*" concepts beyond well-defined and limited bounds. *See, e.g., Business Electronics v. Sharp Electronics,* 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Unfortunately, the Ninth Circuit here traverses a number of pages discussing an inapplicable theory of price fixing, and even then fails to come to grips with the facts giving rise to this Court's decision in *Maricopa.* This failure leads to the fatally flawed conclusion that this case might fall within the prohibitions set forth there, and puts the Ninth Circuit decision here in conflict with the decisions by the First Circuit in *Blue Shield of Massachusetts*, the Second Circuit in *Blue Shield of Connecticut*, the Third Circuit in *Pennsylvania Blue Shield,* the Fifth Circuit in *Blue Shield of Texas II,* and the Seventh Circuit in *Blue Shield of Indiana,* that similar Blue Shield plans do not constitute "*per se*" violations.

In *Maricopa,* plaintiff State of Arizona sought only injunctive relief against agreements among competing physicians, set by majority vote, setting maximum fees. 457 U.S. at 336 & n.1. The two Foundation defendants were not insurers, indemnitors, or purchasers of services but were groups of physicians who established "relative value" and "conversion factor" schedules. 457 U.S. at 336-340. This Court identified an "insurer" as one who bears the risk of a subscriber needing services. 457 U.S. at 339 n.7. Speaking for four members of this Court, Justice Stevens noted that they were not concerned with

an insurer "fixing" prices at which it would reimburse physicians: the United States, in an amicus brief, had expressed the opinion that an insurer (such as a Blue Shield plan) could do so, with this Court specifically noting that "[w]e do not suggest that Blue Shield plans are not actually controlled by doctors," while stating that insurers could "fix" prices at which physicians would be reimbursed for services rendered to subscribers. 457 U.S. at 352-353 & n.26. Justice Stevens went further and noted that someone must canvass physicians' fees in order to determine what a reasonable price is. 457 U.S. at 353 n.28. On the facts before them, it was the physicians with market power who were jointly setting the fee schedules against the potential interest of the insurers, such as Blue Shield plans. See 457 U.S. at 354 & n.29. Neither of the two Foundation defendants could be considered a joint venture, or partnership, where the risks were on the venture: such a venture would be considered a single firm, not a conspiracy. 457 U.S. at 357. If such a single firm, such as a clinic, offered flat fee coverage, the cooperating doctors would have an arrangement in which price fixing agreements would be "perfectly proper." 457 U.S. at 357-358. (Justice Powell, writing in dissent for Chief Justice Burger and Justice Rehnquist, argued essentially that there were many pro-competitive features to the challenged arrangement, 457 U.S. at 358-367, and Justices Blackmun and O'Connor did not participate.)

The case under review here is such a plan, where the participating physicians share the risk through a withhold agreement in a corporate enterprise, where nonphysicians manage and operate the health care policies, and where the state of Oregon supervises and regulates OPS. OPS is a corporation operating as an "insurer," and as with a joint venture or partnership, it

would be "perfectly proper" for it to "fix" the price at which physicians will be reimbursed.

The Ninth Circuit's attempt to expand liability beyond that found by this Court in *Maricopa* led to its addition of footnote 5 to the amended opinion. That Ninth Circuit footnote would require a defendant to prove not just that it was a single integrated economic unit, but further that risk capital had been invested and individual members shared in "profit," and absent such proof by defendant, the arrangement is condemned as a "*per se*" violation. That Ninth Circuit requirement cannot be the law, and is contradicted by the following holding from this Court's decision in *Copperweld* that "such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." 467 U.S. at 768 (citations omitted).

The result reached in *Hassan v. Independent Practice Associates, P.C.*, 698 F. Supp. 679 (E.D. Mich. 1988) is illustrative. There, the defendant independent practice association ("IPA") was owned by the physicians who comprised the group. 698 F. Supp. at 681. There was a 12 percent "risk withhold," and occasions when payments had been delayed. 698 F. Supp. at 682. The board of directors for co-defendant HMO was made up of subscribers, the public, and physicians, but there was a dispute about the amount of control exercised by IPA and its physicians over co-defendant and its Board. Defendants there were able to avoid a *per se* price fixing charge because, among other reasons, the court determined that "[p]rice fixing agreements can be lawful if they are a necessary part of an integration of resources - a joint venture." 698 F. Supp. at 688. The court distinguished *Maricopa* as not involving an "insurer." 698 F. Supp. at 690. This result contradicts that reached by

the Ninth Circuit here. Similarly, the First Circuit in *Blue Shield of Massachusetts,* 749 F.2d at 931, the Second Circuit in *Blue Shield of Connecticut,* 675 F.2d at 505, the Third Circuit in *Pennsylvania Blue Shield,* 745 F.2d at 259-260, the Fifth Circuit in *Blue Shield of Texas II,* 737 F.2d at 1436-1437, and the Seventh Circuit in *Blue Shield of Indiana,* 768 F.2d at 199-200, hold similar Blue Shield plans do not constitute "*per se*" violations.

If the Ninth Circuit decision here is left standing, it would effectively negate any nonprofit arrangement such as the one here, because, by definition, members would not be able to share in "profit," and in many instances would not have invested capital, but instead "only" assumed risk that premiums would not cover payments. This would in essence eliminate one category of non-profit "health care service contractor" specifically sanctioned by the state of Oregon. ORS 750.005(2)(a) (App. M to petition No. 82-1773). The Ninth Circuit result here was neither contemplated nor intended by this Court in *Maricopa.* Although this Court used "profit-sharing" as but one example of the type of arrangement that was sufficiently integrated, that discussion in *Maricopa* should not be read to require all of the elements discussed in order for a health care defendant, such as the nonprofit corporation here, to be considered sufficiently "integrated." To so read it as does the Ninth Circuit here would denigrate state laws that allow just such corporations to operate.

Because the Ninth Circuit decision here conflicts with the decisions by the First Circuit in *Blue Shield of Massachusetts,* the Second Circuit in *Blue Shield of Connecticut,* the Third Circuit in *Pennsylvania Blue Shield,* the Fifth Circuit in *Blue Shield of Texas II,* and the Seventh Circuit in *Blue Shield of Indiana,* the district court decision in *Hassan,* and this Court's decision in

Maricopa, this Court should grant the writ to review and reverse the erroneous determination by the Ninth Circuit.

III.
There Is No "Group Boycott" Here, Where There Is No Conspiracy, Oregon State Statutes Differentiate Between Plaintiffs and Other Health Care Providers, OPS Was Concerned About "Overutilization" by Health Care Providers Like Plaintiffs, and the Ninth Circuit Result Here is Contrary to Blue Shield Decisions From the First, Third, and Fifth Circuits, and This Court's Decision Reversing a Previous Ninth Circuit Decision.

The only arguably appropriate theory advanced by plaintiffs here is "group boycott" (although, as even the Ninth Circuit apparently acknowledged, this claim is probably more accurately analysed as a "refusal to deal"). But then plaintiffs' real complaint is that they were not allowed to be part of the "price fixing conspiracy:" now that they are participating health care providers (in successor Blue Cross and Blue Shield of Oregon), their only argument can be that they were somehow improperly prohibited from participating sooner.

For the reasons already advanced, plaintiffs have failed to come forward with evidence that there was any "conspiracy," much less one among "competitors" directed at them. As set forth before, OPS was not under any affirmative obligation to "prove" that there was no conspiracy. *E.g., Houser*, 845 F.2d at 1229, 1231 n.13 (3d Cir. 1988). Nonetheless, OPS came forward with a number of proper justifications for its conduct, including the fact that the non-physician staff personnel who were responsible for the operation of the system felt that there were significant concerns regarding overutilization of podiatric services. There is no evidence that any

competitor of plaintiffs, physician or otherwise, influenced any decision by OPS to include or exclude podiatrists. The "scintilla" of evidence produced by plaintiffs and to which the Ninth Circuit opinion alludes involved a proposal to include a number of categories of providers as participants, where a non-physician board member (Ms. Gamble) was the one who suggested that only optometrists be admitted at that time. That is hardly "evidence" of a conspiracy by competitors to improperly exclude podiatrists, much less the substantial evidence tending to exclude the inference of proper conduct by OPS which plaintiffs must produce under this Court's recent summary judgment decisions. Furthermore, there was no "boycott" (or "refusal to deal"), because OPS in fact "dealt" with plaintiffs by reimbursing OPS subscribers for services rendered by plaintiffs. And plaintiffs were perfectly free to deal with other patients and insurers as well.

The Ninth Circuit decision conflicts with this Court's decision in *Northwest Stationers v. Pacific Stationery,* 472 U.S. 284 (1985) (*"Northwest"*), the First Circuit decision in *Blue Shield of Massachusetts,* the Third Circuit decision in *Pennsylvania Blue Shield,* the Fifth Circuit decision in *Blue Shield of Texas II,* and the Seventh Circuit's decision in *Moore v. Boating Industry Associations,* 819 F.2d 693, *cert. denied,* _ U.S. _, 108 S. Ct. 160, 98 L.Ed.2d 115 (1987).

In *Northwest,* this Court reversed a Ninth Circuit panel's decision that had injected a "fairness" doctrine into private antitrust boycott theory. In *Blue Shield of Massachusetts, Pennsylvania Blue Shield,* and *Blue Shield of Texas II,* the First, Third, and Fifth Circuits held that similar Blue Shield plans did not constitute an illegal "boycott." 749 F.2d at 932; 745 F.2d at 259-260; and 737 F.2d at 1433. In *Moore,* the Seventh Circuit, on remand

from this Court for review in light of *Northwest*, rejected a previous panel decision cited by plaintiffs here below, thereby rejecting various boycott theories advanced by plaintiffs here.

Because the Ninth Circuit opinions here conflict with this Court's previous reversal of a prior Ninth Circuit panel's attempt to import a "fairness" doctrine into private antitrust boycott theory, conflict with the decisions by the First, Third, and Fifth Circuits regarding similar Blue Shield plans, and conflict with the Seventh Circuit's rejection of similar boycott theories in *Moore*, this Court should grant the petition for a writ of certiorari to review and reverse the Ninth Circuit opinions.

A.

The Ninth Circuit Erroneously Allowed "Boycott" Theories Here Without Requiring Plaintiffs to Show Detrimental Effects or Market Power Where OPS Covers No More Than Sixteen Percent of Potential Subscribers, Contrary to This Court's Decision and the Seventh Circuit's Decision Regarding Blue Shield and Other Health Care Insurers of Indiana.

The Ninth Circuit's failure to require plaintiffs here to prove market power or detrimental effects conflicts with this Court's recent decision in *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986) (*"Indiana Federation of Dentists"*), and the Seventh Circuit's decision in *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325 (1986) (*"Blue Shield of Indiana II"*).

In *Indiana Federation of Dentists,* a case involving health care insurers in Indiana, this Court reaffirmed that generally a boycott case cannot proceed without a finding of market power, or actual detrimental effects on competition. 476 U.S. at 458, 460-461. In *Blue Shield of*

Indiana II, the Seventh Circuit discusses the importance of showing market power, there through a showing of market share. 784 F.2d at 1334-1338.

The Ninth Circuit here allowed plaintiffs to proceed without any showing of market power or actual detrimental effects, in conflict with this Court's decision reaffirming the requirement in *Indiana Federation of Dentists*, and the Seventh Circuit's emphasis in *Blue Shield of Indiana II*. On this ground, this Court should grant the writ to review and reverse this erroneous Ninth Circuit determination.

B.

The District Court Properly Found Plaintiffs Had Failed to Show Antitrust Injury, and the Ninth Circuit Erred by Allowing Plaintiffs to Proceed Without Such Showing, In Conflict With Blue Shield Decisions of the First and Fifth Circuits and Decisions of This Court and The Seventh Circuit.

Finally, the Ninth Circuit erred by allowing plaintiffs to proceed without a showing of injury to competition. This puts the Ninth Circuit decision in conflict with this Court's decision in *Brunswick*, and the decisions by the First Circuit in *Blue Shield of Massachusetts,* the Fifth Circuit in *Blue Shield of Texas III,* and the Seventh Circuit in *Zinser v. Rose*, 868 F.2d 938 (1989).

Not only do plaintiffs lack antitrust standing under this Court's decision in *Blue Shield of Virginia*, but they also lack "standing" because they failed to prove any injury to competition, as distinct from injury to themselves. Here, plaintiffs merely complain that they, themselves, may have lost some business. The Ninth Circuit panel ignored *Blue Shield of Texas III* (¶ 66,849

at 64,217 (App. F at 59-60)) and instead extends the *Virginia Academy* decision of the Fourth Circuit in allowing plaintiffs to proceed.

The First Circuit in *Blue Shield of Massachusetts*, like the Fifth Circuit in *Blue Shield of Texas III*, held that the health care provider plaintiffs there had failed to demonstrate antitrust injury as a result of the actions of the Blue Shield defendant, and the Seventh Circuit in *Zinser* similarly held that the health care provider plaintiffs there had failed to demonstrate antitrust injury with respect to comparable health care insurer defendants. *Accord Feldman*, 571 F. Supp. at 1009-1010.

In view of this conflict and because of support shown for the District Court's analysis in this Court's decision in *Brunswick*, and decisions in the First Circuit in *Blue Shield of Massachusetts*, the Fifth Circuit in *Blue Shield of Texas III*, the Seventh Circuit in *Zinser*, and the Eleventh Circuit in *Feldman*, this Court should grant certiorari to review and reject the Ninth Circuit panel's erroneous analysis.

CONCLUSION

For the foregoing reasons a writ of certiorari should be issued to review the judgment and opinions of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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